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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ADAM WALTER SHARPE, Defendant and Appellant.	B169924 (Super. Ct. No. KA059635)

APPEAL from a judgment of the Superior Court of Los Angeles County. Philip S. Gutierrez, Judge. Affirmed.

Alan Siraco, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Keith H. Borjon, Supervising Deputy Attorney General, and Sharlene A. Honnaka, Deputy Attorney General, for Plaintiff and Respondent.

A jury found Adam Sharpe guilty of attempted murder, robbery, attempted kidnapping to facilitate a carjacking and other offenses. On appeal Sharpe contends the trial court erred when it (1) admitted a witness's preliminary hearing testimony at trial, (2) failed to instruct the jury sua sponte on assault with a deadly weapon, (3) instructed the jury with CALJIC No. 2.01, and (4) imposed a firearm discharge enhancement on his sentence for attempted kidnapping to facilitate a carjacking. Sharpe also contends the prosecutor committed *Doyle*[1] error, and there was insufficient evidence to sustain his conviction for attempted kidnapping to facilitate a carjacking. We affirm.

FACTS AND PROCEEDINGS BELOW

Witnesses testified to the following facts at trial:

At about 10:30 p.m. on December 6, 2002, a robber entered a 7-Eleven store. He was wearing a gray ski mask and was carrying a small handgun. Jawed Sayed, the store clerk, and his friend, Umesh Singh, were standing behind the check-out counter. Patrick Adongo and Wesley Miyamoto were the only two customers in the store. They were both standing in front of the counter.

The robber approached the counter and stood between the two customers. He pointed the gun at the men behind the counter and demanded money. Sayed opened the cash register and took out the till. The robber ordered Sayed to put the money in a bag and Sayed complied. Later the robber pointed the gun at Miyamoto and demanded his wallet. Miyamoto turned it over.

The robber asked Adongo where his car was. Adongo told him it was parked in front of the store. With the gun pointed at Adongo's side, the robber said, "Let's go," and he escorted Adongo out to his van. Adongo thought the robber would shoot him if he tried to escape. When they reached the front of the van, the robber said, "Get in," then he walked around to the passenger side of the vehicle. Adongo unlocked the doors. The

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[1] *Doyle v. Ohio* (1976) 426 U.S. 610.

robber opened the passenger side door and got inside the van. Adongo opened the driver's side door and "pretended" he was going to sit down in the van. Instead he pressed a button which locked all of the doors to the van, and he slammed the driver's side door shut. In his own words, Adongo "took off like an airplane," running in the direction of a gas station across the street. As he was approaching the gas station, he heard two or three gunshots.

From inside the store, Singh also heard a gunshot. He turned to look and saw the driver's side window of the van shatter. The robber climbed out of the van through the shattered window. He took a couple of steps toward the store, raised his gun, and fired a shot at the glass door to the store. Singh heard the glass shatter. He dropped to the ground and told Sayed to do the same. Then, Singh heard another gunshot. At this point, the robber apparently left the scene.

Officer Michael Matthews responded to the 7-Eleven store. He set up the southeast portion of a perimeter, about a half a mile away from the store. From inside his patrol car, Officer Matthews spotted a man walking across the street within the perimeter area, who matched the description of the suspect. It was Sharpe. Officer Matthews got out of his vehicle and approached Sharpe at about 10:50 p.m. Sharpe told him he lived right across the street. Officer Matthews noticed Sharpe "was sweating quite a bit," even though it was a "cool . . . almost cold" December evening.

Officer Matthews conducted a pat-down search and felt a hard object in the pocket of Sharpe's pants. He asked Sharpe what it was and Sharpe said it was money. Officer Matthews removed the object, which was $577 in cash. He contacted another officer at the crime scene and asked about the money taken during the robbery. He also requested back-up. He told Sharpe he was going to detain him for further investigation. He handcuffed Sharpe behind his back and sat him down in the street against the left front wheel of his patrol car. At about this time, Officer Omar Annabi responded to assist Officer Matthews. He also noticed Sharpe "was sweating heavily for it being a cold night in December."

According to Officer Matthews, Sharpe was acting "mildly agitated" as he sat in the street. At one point, Sharpe tried to raise up "on his haunches." Officer Annabi told him to sit back down. The officers arrested Sharpe and placed him in the back of a patrol car. Officer Matthews moved his patrol car forward several feet so it would not be blocking an intersection. Upon exiting the vehicle, Officer Matthews saw a handgun in the street "right where" Sharpe had been sitting. He was confident the gun was not there before he detained Sharpe.

An officer transported Sharpe to the police station. During a booking search, the police found a gray ski mask inside the leg of Sharpe's pants. Both Adongo and Miyamoto believed the mask looked just like the one the robber wore.

Detective Ryan Smith, the investigating officer, found a piece of broken glass "near the collar area" of the jacket Sharpe was wearing when he was arrested. Smith compared it to glass recovered from the shattered window of Adongo's van and found it to have the same thickness and tinting. A firearms examiner determined spent rounds and casings found at the scene, including a casing recovered from Adongo's van, were from the gun the officers found when they detained Sharpe. Adongo said the gun looked like the one the robber used.

The morning after the incident, around 3:00 a.m., Detective Smith interviewed Sharpe at the police station. The interview was videotaped, but Sharpe did not know it at the time. Detective Smith read Sharpe his *Miranda* rights, and Sharpe said he wanted to talk about the case. Sharpe claimed he did not know why he was arrested. Detective Smith informed Sharpe about the charges against him.

According to Sharpe, he had been home alone, and was just leaving his house when an officer detained him. He had a little less than $600 on him. It was money he had saved up. He did not have a gun with him when he was arrested, and he did not know the police had found a gun underneath the car next to where he was standing.

Detective Smith questioned Sharpe about the mask found in his pants. Sharpe said, "It's just a mask." Detective Smith asked Sharpe why he had it. Sharpe responded, "you know, it's cold. I wear it." Detective Smith commented on the fact Sharpe was not

wearing the mask at the time he was detained. Detective Smith asked Sharpe if he "normally" carried the mask "stuffed down" inside the leg of his pants. Sharpe responded, "normally when [I]'m getting accused of robbing 7-11's [*sic*]." Sharpe explained he had the mask in his pocket when the officer stopped him and he stuffed it down his pants.

After the discussion about the mask, Sharpe said "You know what, I change my mind, man. I don't think I should be talking to you without a uh lawyer." He added, "I didn't do this shit and it sounds, it's starting to sound like I did do this."

In an amended information, Sharpe was charged with two counts of attempted murder (involving Sayed and Singh),[2] two counts of robbery (involving Sayed and Miyamoto),[3] attempted kidnapping of Adongo,[4] discharge of a firearm with gross negligence[5] and attempted kidnapping of Adongo to facilitate a carjacking.[6] As to all counts except count 6 for discharge of a firearm with gross negligence, the amended information alleged Sharpe personally used a firearm within the meaning of sections 1203.06, subdivision (a)(1), 12022.5, subdivision (a) and 12022.53, subdivision (b), and personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (c).[7]

At trial, the court admitted Singh's preliminary hearing testimony, finding Singh was unavailable as a witness and Sharpe had had an opportunity to cross-examine Singh about the incident at the preliminary hearing.

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[2] Penal Code sections 187, subdivision (a) and 664. All further statutory references are to the Penal Code unless otherwise noted.

[3] Section 211.

[4] Sections 207, subdivision (a) and 664.

[5] Section 246.3.

[6] Sections 209.5, subdivision (a) and 664.

[7] Before trial, the court granted the prosecutor's motion to dismiss count 8 for attempted kidnapping of Adongo to commit a robbery. The court also granted the prosecutor's motion to strike the special allegations stating the attempted murders were committed willfully, deliberately and with premeditation.

Sharpe testified at trial. He said, at 10:00 p.m. on December 6, 2002, he was inside his house with his friend, Jasmine. They were having sex. At about 10:35 p.m., he went outside to smoke a cigarette containing marijuana and PCP. While he was standing in his driveway, he saw "an object fly" and land in the middle of the street. Then he saw a man run past his house and throw something on his lawn.

Sharpe picked up the item thrown on his lawn. It was a gray ski mask. Inside the mask was a paper bag filled with money. Sharpe went inside his house and into the bathroom to count it. He stopped counting at about $400. He arranged the money from highest to lowest denominations, folded it, put a rubber band around it and stuck it in his pocket. He did not tell Jasmine about the money.

Then Sharpe went back outside to see what the man had thrown in the street. He saw a shiny object. Before he could retrieve it, he saw a police officer. Sharpe moved away from the object and started to cross the street. That's when Officer Matthews stopped him. While Sharpe was sitting in the back seat of the patrol car, he saw the officers pick up a gun. The gun did not belong to him and he did not put it there. When Sharpe was detained, Jasmine did not come out of the house to talk to the police.[8]

Because Sharpe did not trust the police and he knew he was innocent, he never told them about the man who threw the ski mask and shiny object. Nor did he tell them he was in his house with Jasmine at the time of the incident. Sharpe said he was not near any broken glass that day and he did not believe the officers really found a piece of glass in his jacket.

During rebuttal, the prosecutor questioned Detective Smith about his interview with Sharpe on the night of the incident. The prosecutor also showed the jury a portion of the videotape from the interview.

The jury found Sharpe guilty of all of the charged offenses and found all of the special allegations to be true. The trial court sentenced Sharpe to 44 years eight months in prison. On count 1 for attempted murder of Sayed, the court sentenced Sharpe to the

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[8] Sharpe had not had any contact with Jasmine since his arrest.

middle term of seven years, plus a consecutive term of 20 years for the firearm discharge enhancement. On count 2 for attempted murder of Singh, the court imposed the same 27-year sentence to run concurrently with the sentence on count 1. On count 3 for robbery of Sayed, the court sentenced Sharpe to one-third the middle term on the offense (one year), plus a consecutive term of three years four months for the firearm use enhancement. On count 4 for robbery of Miyamoto, the court imposed another consecutive term of four years four months on the offense and the firearm use enhancement. On count 5 for attempted kidnapping of Adongo, the court sentenced Sharpe to the middle term on the offense (two and a half years), plus a consecutive term of 10 years for the firearm use enhancement, but stayed the sentence under section 654. On count 6 for discharge of a firearm with gross negligence the court sentenced Sharpe to the middle term of two years, but stayed the sentence under section 654. On count 7 for attempted kidnapping of Adongo to facilitate a carjacking, the court sentenced Sharpe to one-third the middle term on the offense (two years four months), plus a consecutive term of six years eight months for the firearm discharge enhancement.

DISCUSSION

I. THE TRIAL COURT DID NOT ERR IN ADMITTING SINGH'S PRELIMINARY HEARING TESTIMONY AT TRIAL.

Sharpe contends the admission of Singh's preliminary hearing testimony violated his Sixth Amendment confrontation right because he did not have an adequate opportunity to cross-examine this witness against him.

Under the Evidence Code, a declarant is "unavailable as a witness" if he or she is "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's

process."[9] Sharpe does not challenge the trial court's determination Singh was unavailable as a witness.

Evidence Code section 1291 provides, once a trial court rules a party is unavailable as a witness, "[e]vidence of [his or her] former testimony is not made inadmissible by the hearsay rule" if "[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing."[10]

As the trial court found in ruling on this issue, Sharpe had an opportunity to cross-examine Singh at the preliminary hearing about the "facts and circumstances" of the incident. And Sharpe did in fact cross-examine Singh.[11] The prosecutor read to the jury all of Singh's testimony, including the four and a half pages of cross-examination. Singh testified about what he observed from the moment the robber entered the store until the robber raised his gun and fired two shots, at least one of which the robber aimed toward the store. Singh did not identify Sharpe as the robber, nor did anyone ask him whether he could do so.

Sharpe argues his motive in cross-examining Singh at the preliminary hearing was not "sufficiently similar" to his motive at trial. Sharpe speculates, had Singh testified at trial, he "would have been cross examined more vigorously regarding the shots fired: when and from what location they came; whether anything else in the store was hit; etc."

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[9] Evidence Code section 240, subdivision (a)(5).

[10] Evidence Code section 1291, subdivision (a)(2); *Crawford v. Washington* (2004) 124 S.Ct. 1354, 1369, 1374 ("Testimonial statements of witnesses absent from trial" are admissible "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine")

[11] Sharpe points out the attorney who represented him at the preliminary hearing is not the same attorney who represented him at trial. The trial court relieved Sharpe's first attorney because of some undisclosed conflict. We cannot see how this fact is relevant to our resolution of the issue. Based on our review of the record, it does not appear the conflict had any impact on counsel's cross-examination of Singh.

Sharpe asserts the cross-examinations of Adongo and Miyamoto at trial "addressed completely different topics than those at the preliminary hearing."

The fact Sharpe might have asked Singh additional questions about a particular aspect of the incident at trial does not mean Sharpe had a dissimilar interest and motive in cross-examining Singh at the preliminary hearing. "[A]s long as a defendant was provided the *opportunity* for cross-examination, the admission of preliminary hearing testimony under Evidence Code section 1291 does not offend the confrontation clause of the federal Constitution simply because the defendant did not conduct a particular form of cross-examination that in hindsight might have been more effective."[12]

Sharpe had an opportunity to cross-examine Singh at the preliminary hearing about what Singh saw and heard during the incident. Moreover, Sharpe made use of this opportunity. We find the requirements of Evidence Code section 1291 were met, and the trial court properly admitted Singh's preliminary hearing testimony.

II. THE PROSECUTOR DID NOT COMMIT *DOYLE* ERROR.

Sharpe asserts the prosecutor committed *Doyle* error by questioning Sharpe about, and commenting upon, Sharpe's post-arrest silence. The People contend Sharpe waived this claim on appeal by not objecting below. In the alternative, the People argue there was no error because Sharpe did not remain silent and "the use of a defendant's voluntary statements given after a waiver of *Miranda* rights to impeach inconsistent trial testimony" does not constitute a *Doyle* violation.[13]

In *Doyle v. Ohio*,[14] the United States Supreme Court held "once an arrestee chooses to remain silent after being admonished pursuant to *Miranda v. Arizona*

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[12] *People v. Samayoa* (1997) 15 Cal.4th 795, 851, citing *People v. Zapien* (1993) 4 Cal.4th 929, 975.

[13] Because it is clear there was no *Doyle* error, we will not address the People's waiver argument.

[14] *Doyle v. Ohio* (1976) 426 U.S. 610, 611, 619.

[citation], the prosecution cannot use the fact of that silence to impeach an exculpatory story told for the first time at trial."[15] The *Doyle* Court reasoned, "Silence in the wake of these warnings may be nothing more than the arrestee's exercise of [his] *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested."[16]

"The only qualification to *Doyle* is that it will permit a defendant who presents exculpatory testimony at trial to be questioned about a post-*Miranda* statement if that statement is inconsistent with the version unveiled at trial."[17] "'Such questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving *Miranda* . . . warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all.'"[18]

After the police arrested Sharpe and gave him *Miranda* warnings, Sharpe agreed to talk to Detective Smith about where he was and what he was doing during and after the incident at 7-Eleven. At trial, Sharpe told the jury a radically different story. The prosecutor cross-examined Sharpe about what he told Detective Smith and why it was so different from what he told the jury. The prosecutor also showed the jury a portion of the videotape of Sharpe's interview with Detective Smith.

Sharpe argues the prosecutor questioned him about, and commented upon, his silence. What silence? Sharpe chose to waive his right to remain silent and make voluntary statements to the police. The prosecutor had a right to use those statements to impeach Sharpe's trial testimony.[19] Sharpe cannot use *Doyle* as a means to hide his inconsistent statements from the jury.[20]

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[15] *People v. Evans* (1994) 25 Cal.App.4th 358, 362.

[16] *Doyle v. Ohio*, *supra*, 426 U.S. at page 617.

[17] *People v. Evans*, *supra*, 25 Cal.App.4th at pages 369-370.

[18] *People v. Osband* (1996) 13 Cal.4th 622, 694, quoting *Anderson v. Charles* (1980) 447 U.S. 404, 408.

[19] The prosecutor asked Sharpe, knowing he was "facing some serious charges," and believing he was innocent, wouldn't he "want to tell the police that night everything that

III. THE TRIAL COURT DID NOT HAVE A SUA SPONTE DUTY TO INSTRUCT THE JURY ON ASSAULT WITH A DEADLY WEAPON.

Sharpe contends assault with a deadly weapon is a lesser included offense of attempted murder in this case and the trial court had a sua sponte duty to instruct the jury accordingly.

"'Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser.' [Citation.]"[21] "[A] trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence."[22]

Assault with a deadly weapon is not a lesser included offense of attempted murder where the information alleges the attempted murder count in the statutory terms set forth in section 187, subdivision (a) -- i.e., "[m]urder is the unlawful killing of a human being . . . with malice aforethought."[23] Here, the information and amended information alleged

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happened . . . ?" Sharpe contends the prosecutor here was using the fact of his post-arrest silence in violation of *Doyle*. We disagree based on the facts and circumstances of this case. First, Sharpe did not remain silent. Moreover, the prosecutor made this inquiry during his questioning about the specific statements Sharpe made to Detective Smith the night of the incident, which were inconsistent with the story he told the jury. The prosecutor already knew he planned to show the jury the videotape from the interview to impeach Sharpe's trial testimony and to demonstrate Sharpe made voluntary statements after receiving *Miranda* warnings.

[20] Because we conclude the prosecutor did not commit *Doyle* error, we need not address Sharpe's claim his counsel rendered ineffective assistance by not objecting to the prosecutor's questions and argument about Sharpe's interview with Detective Smith.

[21] *People v. Breverman* (1998) 19 Cal.4th 142, 154, footnote 5.

[22] *People v. Breverman*, *supra*, 19 Cal.4th at page 162.

[23] *People v. Lewis* (1960) 186 Cal.App.2d 585, 600 ("Thus, if the indictment in this case had charged murder with a hatchet, then assault with a deadly weapon, or with means likely to cause great bodily harm would be necessarily included offenses. The indictment here did not charge murder by this means, but merely the statutory crime in general terms").

Sharpe "did unlawfully and with malice aforethought attempt to murder" two of his victims.

Sharpe does not dispute the foregoing. But he claims assault with a deadly weapon is a lesser included offense of attempted murder in this case in light of the firearm discharge enhancement pleaded in the amended information.

In *People v. Wolcott*, a robbery case, the California Supreme Court held "an allegation of firearm use under section 12022.5 should not be considered in determining a lesser included offense" (assault with a deadly weapon).[24] Sharpe argues *Wolcott* is distinguishable because it involved a firearm *use* enhancement, not a firearm *discharge* enhancement. The Supreme Court apparently did not intend for *Wolcott* to be interpreted so narrowly. In describing this holding in a later case, the Supreme Court stated, "in *People v. Wolcott*, . . . this court expressly rejected the notion that sentence enhancement allegations in an accusatory pleading could be considered for the purpose of defining lesser offenses included within the substantive offense charged."[25]

Accordingly, in this case assault with a deadly weapon is not a lesser included offense of attempted murder, and the trial court did not have a sua sponte duty to instruct the jury on this crime.[26]

IV. THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY WITH CALJIC NO. 2.01.

Using CALJIC No. 2.01, the trial court instructed the jury as follows:

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[24] *People v. Wolcott* (1983) 34 Cal.3d 92, 101 (italics added); *In re David S.* (1983) 148 Cal.App.3d 156, 159 ("In the absence of such bolstering of the accusation through use of the special [firearm use] allegation, the crime of assault with a deadly weapon is not a necessarily included offense within a charge of attempted murder.").

[25] *People v. Bright* (1996) 12 Cal.4th 652, 670.

[26] Sharpe's argument *Wolcott* is "unsound" is not appropriately addressed to this appellate court, which is bound to follow Supreme Court authority.

"However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only, [1], consistent with the theory that the defendant is guilty of the crime, but, [2], cannot be reconciled with any other rational conclusion. [¶] Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. [¶] In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.

"Also, if the circumstantial evidence as to any particular count permits two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation that points to the defendant's innocence and reject that interpretation that points to his guilt. [¶ If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable."

Sharpe argues the use of CALJIC NO. 2.01 violated his constitutional rights to due process and trial by jury because this instruction "suggests that the jury must evaluate evidence according to whether it tends to prove 'innocence.'" Sharpe complains, "no instruction specifically informed the jurors of the distinction between an inference of 'innocence' and an inference of 'not guilty,' or between a finding of 'innocence' and a finding that guilt has not been proved beyond a reasonable doubt."

In reviewing Sharpe's claim of ambiguous jury instruction, we must decide "'whether there is a reasonable likelihood that the jury misconstrued or misapplied the words' of the instruction. [Citations.] Moreover, '[i]t is well established in California that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.'"[27]

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[27] *People v. Wade* (1995) 39 Cal.App.4th 1487, 1491.

Reviewing the entire charge, we do not believe any rational juror would misconstrue CALJIC No. 2.01 in the manner Sharpe suggests. Using CALJIC No. 2.90, the trial court informed the jury, "[a] defendant in a criminal action is presumed to be innocent until the contrary is proved." Following CALJIC No. 2.01, the jury had to decide whether each piece of evidence presented at trial supported Sharpe's presumed innocent status or pointed to his guilt. CALJIC No. 2.90 made clear the jury was required to return a verdict of not guilty if the prosecution did not meet its burden of proving Sharpe guilty beyond a reasonable doubt. No instruction suggested the jury had to find Sharpe innocent before it could acquit him.

We do not believe the use of the word "innocence" confused the jury about the prosecution's burden of proof. Accordingly, we follow the other appellate courts which have rejected similar challenges to CALJIC No. 2.01.[28]

V. THERE WAS SUFFICIENT EVIDENCE SHARPE INTENDED TO TAKE THE VAN FROM ADONGO WITHIN THE MEANING OF THE CARJACKING STATUTE.

Section 215 defines carjacking as "the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and

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[28] See, e.g., *People v. Wade*, *supra*, 39 Cal.App.4th at page 1493 (CALJIC No. 2.01 "did not tell the jurors they had to find defendant innocent in order not to convict him. 'Innocence' in this jury instruction is used simply to connote a state of evidence opposing guilt. To say that evidence 'points to' innocence does not suggest that a defendant has to prove his innocence"); *People v. Han* (2000) 78 Cal.App.4th 797, 809 (criticizing CALJIC No. 2.01 for its use of the word "innocence" rather than the words to the effect of "a lack of finding of guilt," but pointing out "this court and others have consistently determined that there could be no harm because the other standard instructions make the law on the point clear enough, particularly CALJIC No. 2.90")

with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear."[29]

Sharpe contends this court must reverse his conviction for attempted kidnapping to facilitate a carjacking due to insufficient evidence Sharpe intended to take possession of the van from Adongo.[30] Sharpe concedes the evidence showed he forcibly removed Adongo from the store at gunpoint and ordered Adongo to drive him away from the scene of the crimes. Based on this evidence, Sharpe argues, "had Mr. Adongo not fled, thwarting the robber's getaway, he would have retained possession, dominion and control over the van. He would have turned the ignition, and worked the pedals, steering wheel, transmission and direction signals. He would have been, in fact, driving the van as that act has been defined under the law. [Citation.] The only decision he may have given up is the direction of travel, and even that is uncertain on these facts."

Sharpe has a misapprehension of what it means to take possession of a vehicle for purposes of a carjacking. When a defendant orders his victim at gunpoint to get in the car and drive him away (like Sharpe did in this case), it is clear that defendant intends to take possession of the vehicle by exercising dominion and control over the vehicle.[31] Thus, Sharpe's claim of insufficient evidence lacks merit.

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[29] Section 215, subdivision (a).

[30] When an appellant challenges the sufficiency of the evidence, we "review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) We reverse only where the record clearly shows there is no basis upon which the evidence can support the jury's verdict. (*People v. Montero* (1986) 185 Cal.App.3d 415, 424, citing *People v. Redmond* (1969) 71 Cal.2d 745, 755.)

[31] See *People v. Duran* (2001) 88 Cal.App.4th 1371, 1377 ("When [the defendant] entered the car he threatened to kill the entire family if [the victim] did not take him where he wanted to go. As [the victim] drove the car, [the defendant] told him at gunpoint when to speed up and slow down, when to get on the freeway and when to get off, as well as where and when to turn. A taking [within the meaning of section 215] occurred when [the defendant] imposed his dominion and control over the car by

VI. THE TRIAL COURT PROPERLY IMPOSED THE FIREARM DISCHARGE ENHANCEMENT ON COUNT 7 FOR ATTEMPTED KIDNAPPING TO FACILITATE A CARJACKING.

Sharpe argues "the attempted kidnapping was over when the gun was fired." He therefore contends the trial court erred in imposing a firearm discharge enhancement on count 7.

Under section 12022.53, a firearm discharge enhancement applies to certain felony offenses, such as kidnapping and carjacking, where the defendant intentionally and personally discharged a firearm "in the commission of [that] felony."[32] As the People point out, "a kidnapping does not terminate until the victim is released or otherwise disposed of and the kidnapper reaches a place of temporary safety."[33] In this case, it was up to the jury to decide when the kidnapping terminated.[34]

We have no problem with the jury's finding on this special allegation. Adongo activated the door locks on his van, slammed shut the driver's side door, and started running across the street to the gas station. Then Sharpe fired the gun, shooting out the driver's side window of the van. It would have been reasonable for the jury to conclude Sharpe discharged the gun to prevent Adongo's escape, either by wounding Adongo or scaring Adongo into submission.

Because there was substantial evidence for the jury to conclude the offense was not over at the time Sharpe fired the gun, the trial court properly imposed a firearm discharge enhancement on count 7.

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ordering [the victim] to drive; [the victim]'s response in driving the car where [the defendant] directed him provided the asportation element of the completed crime"). Sharpe's criticism of *Duran's* rationale is unfounded and unsupported by relevant authority.

[32] Section 12022.53, subdivisions (a) and (c).

[33] *People v. Barnett* (1998) 17 Cal.4th 1044, 1167.

[34] See *People v. Ramirez* (1995) 39 Cal.App.4th 1369, 1375.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JOHNSON, J.

We concur:

PERLUSS, P.J.

ZELON, J.